UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-md-02311 Honorable Marianne O. Battani
In re: All Cases THIS DOCUMENT RELATES TO: All Cases	

STATEMENT OF CERTAIN DEFENDANTS IN SUPPORT OF WIRE HARNESS DEFENDANTS' OBJECTIONS TO, AND MOTION TO MODIFY, MASTER ESSHAKI'S SEPTEMBER 3, 2015 ORDER [ECF NO. 352]

Pursuant to Fed. R. Civ. P. 53(f) and the Order Appointing a Master, *In re Automotive Parts Antitrust Litig.*, 2:12-md-02311-MOB-MKM, ECF No. 792, at ¶¶ II.B-C (E.D. Mich. Aug. 9, 2014 ("In re Auto Parts"), Mitsuba Corporation, American Mitsuba Corporation, NTN Corporation, NTN USA Corporation, SKF USA, Inc., Toyoda Gosei Co., Ltd., Toyoda Gosei North America Corporation, TG Missouri Corporation, Schaeffler Group USA Inc., Valeo S.A., Valeo Japan Co., Ltd., Valeo Inc., Valeo Electrical Systems, Inc., Valeo Climate Control Corporation, NSK Ltd., NSK Americas, Inc., Keihin North America, Inc., Robert Bosch LLC, Robert Bosch GmbH, Aisin Seiki Co., Ltd., Aisin Automotive Casting, LLC, Stanley Electric Co., Ltd., Stanley Electric U.S. Co., Inc., II Stanley Co., Inc., Diamond Electric Mfg. Co., Ltd., Diamond Electric Mfg. Corporation, Nachi-Fujikoshi Corporation, Nachi America Inc.,

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As the *Wire Harness* defendants' Motion explains, the September 3 Order is founded on multiple legal errors, and is subject to *de novo* review. The Order also unconstitutionally infringes defendants' First Amendment rights because it was not based on a clear record and specific findings demonstrating the need for a limitation on defendants' rights of speech and because it is not narrowly tailored. Further, the Order will slow and complicate discovery in this MDL rather than making it more efficient.

Although the Order was issued in only the *Wire Harness* cases and does not expressly apply to any other cases, as a practical matter the Order imposes unwarranted and unconstitutional restraints on defendants' ability to conduct basic fact discovery in *all* End Payor cases because all parties in this MDL have been working to coordinate discovery of non-parties

so as to conduct that discovery as efficiently as possible. Commenting Defendants therefore submit this Statement to make their views known to the Court.

We will not burden the Court by repeating each of the arguments made in the *Wire Harness* defendants' Motion, but for the reasons summarized below and stated fully in the W*ire Harness* defendants' Motion, we respectfully request that the Court conduct a thorough *de novo* review of the legal errors that led to the September 3, 2015 Order and vacate Sections 2 and 3 of that Order.

ARGUMENT

Parties to a lawsuit—plaintiffs and defendants alike—have a First Amendment right to contact individuals and entities to obtain information relevant to their claims or defense. As the *Wire Harness* defendants point out, the Special Master unjustifiably circumscribed defendants' First Amendment rights, disregarding not just one, but two directives of the Supreme Court. He failed to have a clear record or to make specific findings justifying the limitation imposed. *Cf. Gulf Oil v. Bernard*, 452 U.S. 89, 101 (1981) (any limitation must be "based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties."). And he entered a broad prohibition of speech rather than an order "carefully drawn" to "limit[] speech as little as possible, consistent with the rights of the parties under the circumstances." *Id*. at 102. The Commenting Defendants would have had no issue with an order directing the defendants not to discuss the pending settlements with members of the preliminarily-approved settlement classes (*i.e.*, the limited issue for which a class has been provisionally certified for some settling defendants), but the September 3 Order goes well beyond that—it bars *any* speech with the non-party dealers or their chosen counsel.

An order limiting communications regarding ongoing litigation between class members and opponents of a class will satisfy First Amendment concerns only "if it is grounded in good

cause and issued with a 'heightened sensitivity' for first amendment concerns," where a "good cause" finding hinges on four criteria: "the severity and the likelihood of the perceived harm [to the contacted party], the precision with which the order is drawn; the availability of a less onerous alternative; and the duration of the order." *Friedman v. Intervet, Inc.*, 730 F. Supp. 2d 758, 762 (N.D. Ohio 2010) (quoting *Kleiner v. First Nat. Bank of Altanta*, 751. F.2d 1193, 1205-06 (11th Cir. 1985)) (internal quotation marks omitted). The September 3 Order fails to meet this standard on all counts.

Notably, the Order makes no mention of the First Amendment concerns at issue here, and as a result, cannot possibly demonstrate "heightened sensitivity" to the First Amendment. The Order makes no specific findings of harm; instead, it merely speculates that "through discovery demands," direct contact "could . . . influence the decision-making of these auto dealers." *See* Order of Special Master Upon Automobile Dealership Plaintiffs and Dan Deery Motor Co.'s Motion for Protective Order and Motion to Quash Improper Subpoenas Served on Absent Auto Dealer Class Members, No. 2:12-cv-00102, ECF No. 352 (Sept. 3, 2015). This vague speculation fails entirely to state with specificity the "severity and likelihood of the perceived harm" required to justify a no-contact order.

Further, the Special Master improperly construed Fed. R. Civ. P. 26, 45, and 30, and wrongly imposed a "particularized need" standard on defendants to obtain basic fact discovery instead of requiring the Auto Dealer Plaintiffs to meet the heavy burden of showing extraordinary circumstances that merit the quashing of a non-party subpoena. *See Spears v. First Am. eAppraiseIT*, No. 13-MC-52, 2014 WL 1045998, at *2 (S.D. Ohio Mar. 14, 2014) ("quashing a subpoena and the complete prohibition of a deposition are certainly extraordinary measures which should be resorted to only in rare occasions").

The discovery at issue here is being pursued solely in the End Payor cases, not the Auto Dealer cases. While the Order appears to focus on the fact that the Auto Dealer cases allege putative classes *in the Auto Dealer cases*, the non-party auto dealers from whom discovery is sought here are not, and cannot be, "absent class members" in the End Payor cases in which their depositions have been noticed. Instead, they are fact witnesses in possession of information highly relevant to the very core of the End Payors' claims. Just like any other non-party fact witness, they are subject to subpoenas for documents and testimony consistent with Rule 45. Neither the Auto Dealers nor the Special Master have identified any legal authority for the proposition that a defendant must show a "particularized need" to serve a subpoena on entities that are not absent class members in the case in which their depositions have been noticed.

Under the Federal Rules and as a matter of basic due process, defendants are entitled to discover, for purposes of the End Payor action, the facts relating to the claim by each individual End Payor. *See Carillo v. Colombi-Monguio*, 862 F.3d 318 (Table) (9th Cir. 1988) ("Denial of discovery which deprives one of the right to present a full defense may violate due process."); *In re Arriola Energy Corp*., 74 B.R. 784, 790-91 (S.D. Tex. 1987) ("The right to present a full defense on the issues is part of a litigant's rights of procedural due process."). Heightening the standard for discovery in a way never contemplated by the Federal Rules of Civil Procedure does not comport with due process. To the contrary, it creates an un-level playing field that advantages the plaintiffs.

As End Payors' counsel candidly admitted during the last status conference, everyone knows that End Payor cases will largely turn on whether the End Payor plaintiffs can certify a class. What the non-party dealers did when they sold vehicles to the named End Payor plaintiffs is at the very heart of that inquiry. The parties need to be able to take discovery regarding

(1) whether or not these dealers were overcharged by OEMs, (2) whether or not these dealers passed any overcharge on to the End Payor plaintiff that purchased a vehicle from the dealer, and (3) whether the existence and passing-on of any such overcharges can be demonstrated through common proof. The Commenting Defendants are confident that the discovery will show that the End Payors cannot meet their burden to demonstrate that they were harmed or that class certification is appropriate. But the only way to fairly examine those core issues is through discovery of the dealers who bought the vehicles from the OEMs and subsequently sold them the named End Payor plaintiffs. By demanding that the Defendants meet a heightened standard for obtaining this core discovery, the September 3 Order erects an entirely unjustified obstacle in the path towards determining the truth in this case.

CONCLUSION

For the foregoing reasons, Commenting Defendants respectfully submit that this Court should vacate Sections 2 and 3 of the Special Master's Order of September 3, 2015.

Dated: September 24, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2015, I caused a true and correct copy of the foregoing STATEMENT OF CERTAIN DEFENDANTS IN SUPPORT OF WIRE HARNESS DEFENDANTS' OBJECTIONS TO, AND MOTION TO MODIFY, MASTER ESSHAKI'S SEPTEMBER 3, 2015 ORDER [ECF NO. 352] to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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